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91-693

Supreme Court, U.S.
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CASE NO.

In The
SUPREME COURT OF THE UNITED STATES

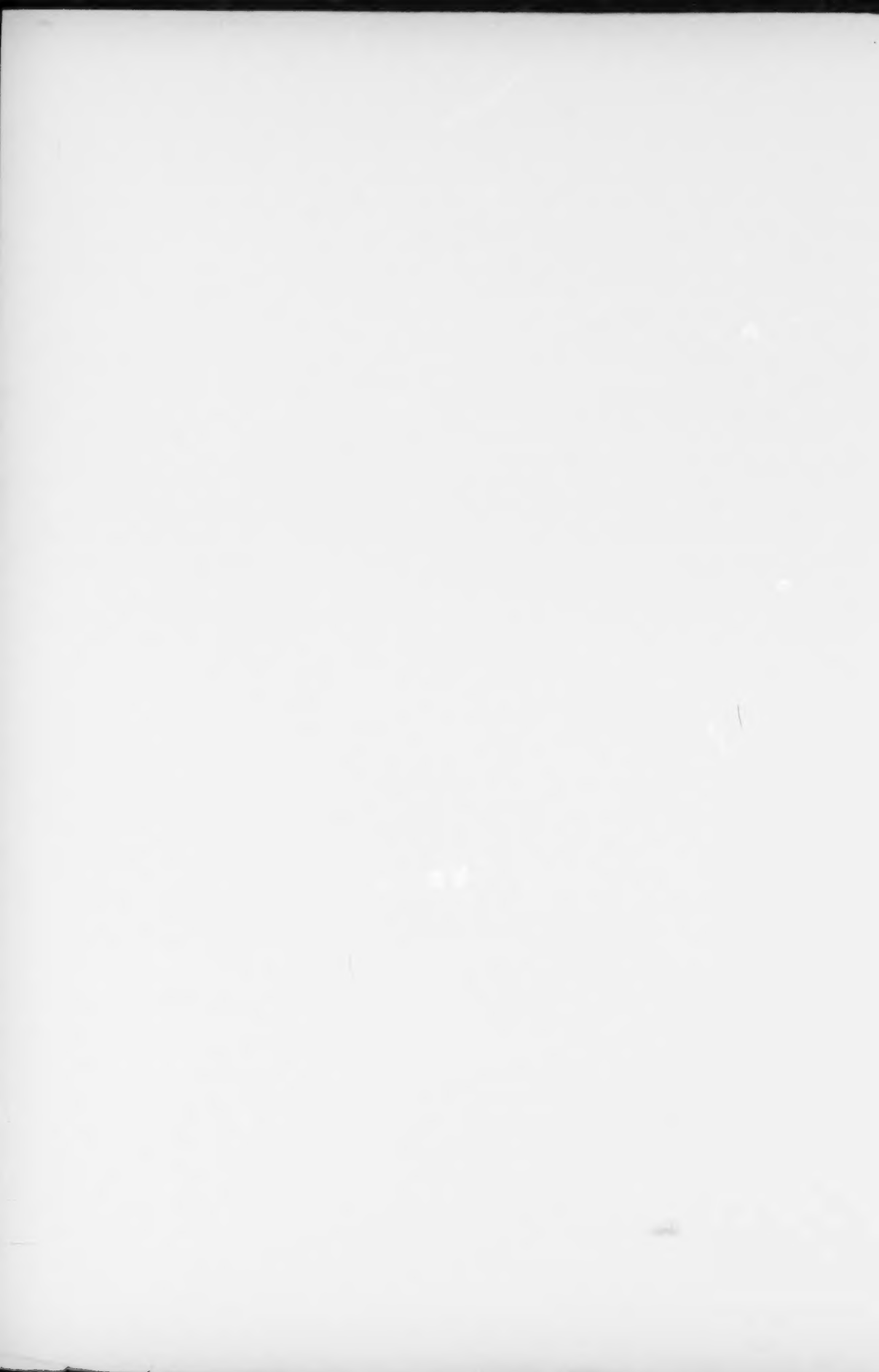
October Term, 1991

FEDERAL INSURANCE COMPANY,
Petitioner,
vs.
CITY OF LAKE LAND,
Respondent.

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the provisions of Federal Rules of Civil Procedure 58 and 59 and Federal Rule of Appellate Proceeding 4(a)(4) apply to important proceedings and determinations occurring after judgment on the merits, such as awards of attorneys' fees.

2. Whether a post-judgment order directing the entry of an attorneys' fees judgment can constitute a "judgment" within the meaning of Federal Rule of Civil Procedure 58, where the separate attorneys' fees judgment has been entered pursuant to the order.

3. Whether motions denominated as seeking to "alter or amend" an attorneys' fees judgment, but which in fact are not directed to that judgment, trigger Federal Rule of Appellate Procedure 4(a)(4) and nullify an otherwise timely notice of appeal.

4. Whether, after the clerk enters a judgment for attorneys' fees based upon the court's post-judgment order requiring further briefing on costs and directing the entry of a separate attorneys' fees judgment, motions addressing only costs issues toll the time for appealing the attorneys' fees judgment pursuant to Federal Rule of Appellate Procedure 4(a)(4).

LIST OF PARTIES TO THE PROCEEDING

The following persons were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit:

1. Fairfield Engineering Company
2. Federal Insurance Company
3. Charles T. Main, Inc.
4. City of Lakeland, Florida

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OPINIONS IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit dismissing petitioner's appeal from the attorneys' fees judgment, and the order denying rehearing, have not been reported, and are reproduced in the appendix hereto. (App. 67 and 73).

The order concerning attorneys' fees and costs and the final judgment for attorneys' fees entered by the United States District Court for the Middle District of Florida have not been reported, and are reproduced in the appendix hereto. (App. 1 and 32).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit rendered its decision and opinion June 19, 1991, and

entered the order denying the timely petition for rehearing on July 26, 1991.

The jurisdiction of this Court to review the decision of the United States Court of Appeals for the Eleventh Circuit is invoked under Title 28, United States Code, Section 1254.

FEDERAL RULES INVOLVED

Rule 58 of the Federal Rules of Civil Procedure:

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recovery only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to

interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Rule 59(e) of the Federal Rules of Civil Procedure:

Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 4(a)(4) of the Federal Rules of Appellate Procedure:

If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or

not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment, or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

STATEMENT OF THE CASEA. Proceedings In The Trial Court

This case arises from a multiple claim, multiple party action in the United States District Court for the Middle District of Florida. Pursuant to the district court's "certification" under Federal Rule of Civil Procedure 54(b) on March 2, 1989, judgments were entered on certain claims involving respondent City of Lakeland ("Lakeland"), petitioner Federal Insurance Company ("Federal"), Fairfield Engineering Company ("Fairfield"), and Charles T. Main, Inc. ("Main"). Fairfield and Federal appealed to the United States Court of Appeals for the Eleventh Circuit from these judgments on the merits, which did not dispose of issues of attorneys' fees and costs. The appeal of the judgments on the

merits is pending in the court of appeals.

1. The March 21, 1990, Order Regarding Attorneys' Fees and Costs, and the Separate Judgment for Attorneys' Fees

On March 21, 1990, the district court entered an order addressing issues of attorneys' fees and costs and directing the entry of a judgment solely for attorneys' fees. App. 1 (the "March 21 Order"). The district court concluded Lakeland was entitled to recover from Federal \$109,485.10 as attorneys' fees, and directed further proceedings as to costs. App. 14, 19, 29, and 30. The March 21 Order specifically directed the entry of a judgment for attorneys' fees:

Accordingly, the Clerk is directed to enter Judgment for the City of Lakeland against Federal Insurance Company for a reasonable attorney's fee in the amount of \$109,485.10.

App. 14. The instruction was repeated later in the March 21 Order:

Lakeland's motion for attorney's fees (doc. #1292) is GRANTED and the Clerk is directed to enter Judgment for the City of Lakeland and against Federal Insurance Company for a reasonable attorney's fee in the amount of \$109,485.10.

App. 29.

In accordance with the district court's instruction in the March 21 Order, an attorney's fees judgment was entered the same day, March 21, 1990.

App. 32 (the "Attorneys' Fees Judgment"). The Attorneys' Fees Judgment stated in its entirety:

IT IS ORDERED AND
ADJUDGED that Judgment is
entered for the CITY OF
LAKELAND and against FEDERAL
INSURANCE COMPANY for a reason-
able attorney's fee in the
amount of \$109,485.10.

App. 33. By its terms, and on its face, the Attorneys' Fees Judgment related

only to attorneys' fees, not costs. Moreover, the Attorneys' Fees Judgment entered on March 21 in no way incorporated any of the costs rulings in the March 21 Order.

Unlike the Attorneys' Fees Judgment, the March 21 Order addressed various costs issues. It considered Fairfield's objections to Main's and Lakeland's bills of costs. The district court ruled that Main's bill of costs be sustained to the extent of \$93,004.06, App. 29, and reserved ruling on Lakeland's bill of costs pending further briefing. App. 19 and 30. As the district stated:

The Court RESERVES RULING on Lakeland's Bill of Costs and Lakeland is directed to file within ten (10) days from the date of this Order a memorandum with accompanying documentation to support the

taxing of costs associated with its expert witnesses within the limitations set forth in 28 USC § 1821. Fairfield shall have five (5) days thereafter within which to respond.

App. 30. With further proceedings ahead on Lakeland's costs claim, the district court did not direct the entry of any judgment on costs. App. 29 and 30.

2. The Motions Filed Following the March 21 Order and the Attorneys' Fees Judgment

All four parties filed motions respecting different aspects of the March 21 Order. Only one of the motions, however, was directed to the attorneys' fees ruling and the Attorneys' Fees Judgment: Lakeland's motion to reconsider pursuant to Federal Rule of Civil Procedure 52(b). That motion, however, was filed untimely, as the district court held in its Order of

July 6, 1990. App. 54-5. The district court ruled that, because the motion was untimely, the court was without jurisdiction to consider the motion. Id.^{1/}

Main's motion, designated as one to "Alter or Amend Judgment," had nothing to do with the Attorneys' Fees Judgment. App. 41-45. Main's motion addressed only the ruling in the March 21 Order concerning Main's bill of costs, and sought the inclusion of a \$1,495.56 item as a recoverable cost. Id.

^{1/} The Attorneys' Fees Judgment was entered March 21, 1990. Excluding intervening Saturdays and Sundays, Lakeland's motion was required to be served on April 4, 1990, but it was not served until April 6, 1990. Lakeland did not appeal the holding that its motion was untimely filed.

Similarly, Fairfield and Federal filed a motion, also misdesignated as one to "Alter or Amend the Judgment," and also addressing only the district court's ruling on Main's bill of costs in the March 21 Order. App. 34-40. Fairfield and Federal sought the correction of an arithmetical mistake in the district court's computation of Main's taxable costs. Id. Federal, the only party other than Lakeland directly affected by the Attorneys' Fees Judgment, did not seek to alter or amend that judgment. Id.

3. Federal's April 20, 1990,
Notice of Appeal from the
Attorneys' Fees Judgment

The Attorneys' Fees Judgment was entered against Federal on March 21, 1990. Because the only post-judgment motion addressing that judgment was untimely filed, Federal filed its notice

of appeal of that judgment timely on April 20, 1990. App. 46.

4. The July 6, 1990, Order and the Costs Judgment

In addition to ruling that Lakeland's Rule 52(b) motion was untimely, the district court's July 6, 1990, Order also disposed of the remaining costs issues. First, it granted both Main's and Fairfield's motions to amend the rulings in the March 21 Order regarding Main's bill of costs. App. 52-3. It also disposed of issues regarding Lakeland's bill of costs. App. 55-63. Finally, it directed entry of judgment for costs as follows:

1. Main's motion to alter or amend (doc. #1394) and Fairfield's motion to alter or amend (doc. # 1396) are GRANTED. The Court's March 21 Order is AMENDED to sustain the taxation of Main's Bill of Costs in the amount of \$18,835.67 rather than \$93,004.00. The Clerk is

directed to enter judgment accordingly.

. . . .

3. The taxation of costs in Lakeland's Bill of Costs is sustained to the extent of \$26,392.82, but in all other respects is withdrawn and set aside. The Clerk is directed to enter judgment accordingly.

App. 63-4.

The district court's rulings in the July 6, 1990, Order did not amend the Attorneys' Fees Judgment, nor did it instruct that an amended judgment be entered. Rather, the July 6 Order amended the March 21 Order (not the judgment), but only with regard to Main's bill of costs, and it directed the clerk to enter a costs judgment as to Main's bill of costs and as to Lakeland's bill of costs. Id.

Thereupon, the clerk entered a judgment which, though misdesignated as

an "amended" judgment, merely amended the March 21 Order regarding Main's bill of costs and entered judgment for Main's and Lakeland's costs. App. 65. The August 7, 1990 costs judgment, thus stated as follows:

IT IS ORDERED AND AD-
JUDGED The Court's order of
March 21, 1990 is AMENDED to
sustain the taxation of Main's
Bill of Costs in the amount of
\$18,835.67 rather than
\$93,004.06. The taxation of
costs in Lakeland's Bill of
Costs is sustained to the
extent of \$26,392.86, but in
all other respects is with-
drawn and set aside.

Id. (emphasis added).

B. Proceedings In The Court Of Appeals

On June 19, 1991, the United States Court of Appeals for the Eleventh Circuit entered a decision and opinion dismissing Federal's April 20, 1990, appeal from the Attorneys' Fees Judgment. App. 67. Basing its ruling

on Federal Rule of Appellate Procedure 4(a)(4), the court of appeals held that the motions "to alter or amend" pending at the time Federal filed its notice of appeal rendered the notice premature and ineffective. The court of appeals ruled as follows:

Federal Insurance Company filed appeal No. 90-3368 on April 20, 1990, from the district court's original judgment for attorney's fees and costs in the action. At that time, however, the parties' timely served motions to alter or amend the judgment were still pending in the district court. Since it is settled that a notice of appeal filed prior to the disposition of such motions is premature and ineffective, this appeal must be dismissed for lack of jurisdiction. Fed.R.App.P. 4(a)(4); Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed.2d 225 (1982); Campbell v. Wainwright, 726 F.2d 702, 703 (11th Cir. 1984).

App. 68-9. Thereafter, the court of appeals denied Federal's petition for

rehearing. App. 73. These are the decisions of the United States Court of Appeals for the Eleventh Circuit which petitioner asks the Court to review.

REASONS FOR GRANTING THE WRIT

There are two good reasons why the Court should grant this petition for a writ of certiorari. First, this case will allow the Court to clarify whether and how Federal Rules of Civil Procedure 58 and 59 and Federal Rule of Appellate Procedure 4(a)(4) apply to important determinations which occur in trial courts following judgments on the merits. In these days when costs and attorneys' fees incurred in litigation can approach, exceed, or even dwarf the

amounts at stake in the case,^{2/} it is important that the order, certainty, and finality afforded by Rules 58 and 59 and Rule 4(a)(4) be present in the significant proceedings, which often are "collateral" in name only, that occur following final judgment on the merits.

Second, this case will allow this Court to provide further guidance in regard to its holdings that post-judgment motions, regardless of their title, designation, or purported basis, which do not question the substantive correctness of a judgment, do not trigger the provisions of Federal

^{2/} In this case, for instance, the jury awarded Lakeland damages in the amount of \$578,187.86, and Lakeland later asked the district court to award it \$426,417.08 for attorneys' fees and \$338,172.35 for experts' fees.

Rule of Appellate Procedure 4(a)(4). See White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982) (motions under 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Awards Act, are not motions to alter or amend the judgment under Federal Rule of Civil Procedure 59(e)); Budinich v. Becton Dickinson & Co., 486 U.S. 196, 108 S.Ct. 1717 (1988), (elaboration on White: all post-judgment motions for attorneys' fees, regardless of the basis under which they are sought, do not extend the time to appeal under Federal Rule of Appellate Procedure 4(a)(4)); and Buchanan v. Stanships, Inc., 485 U.S. 265, 108 S.Ct. 1130 (1988) (post-judgment motion for costs, although brought as a motion under Rule 59(e), is not a motion to alter or amend the judgment, but rather a motion under Rule

54(a) which does not nullify a notice of appeal filed before disposition of the motion); but see Osterneck v. Ernst & Whinney, 489 U.S. 169 (1989) (request for prejudgment interest is properly characterized as a motion to alter or amend the judgment pursuant to Rule 59).

A. The Court of Appeals' Ruling Incorrectly Assumed The March 21 Order Was An Appealable Judgment, Contrary To The Provisions Of Federal Rule Of Appellate Procedure 58

Rule 58 of the Federal Rules of Civil Procedure specifically requires that "[e]very judgment shall be set forth on a separate document." This "separate document" requirement was included in Rule 58 in order to eliminate the "considerable uncertainty over what actions of the District Court would constitute an entry of judgment, and [the] occasional grief to litigants

as a result of this uncertainty." United States v. Indrelunas, 411 U.S. 216, 220 (1973). Rule 58 must be "mechanically applied," id. at 222, because

A conflict on an issue such as this [whether an appealable final decision has been entered], is of importance and concern to every litigant in a federal court, since, as this case makes clear, the timeliness of appeals, as well as the timeliness of post-trial motions, may turn on the question of when judgment is entered.

Id. at 217-18.

Opinions, such as the March 21 Order entered in this case by the district court, generally do not have the effect of judgments. Thus, in United States v. Kansas City, Kansas, 761 F.2d 605 (10th Cir. 1985), the court ruled that a memorandum and order containing "apparently dispositive

language" regarding an attorneys' fees award, was not an appealable Rule 58 judgment. As the court stated:

[T]he district court issued a three page memorandum and order. While this memorandum contained apparently dispositive language, it also included a discussion of legal issues constituting an opinion of the district court. Thus, the memorandum did not qualify as a judgment under Rule 58 .

. . .

761 F.2d at 606. See 11 C. Wright & A. Miller, Federal Practice and Procedure § 2785 (1973). Similarly, the district court's March 21 Order, which also contained a discussion of legal issues, does not "qualify as a judgment under Rule 58."

This is not a case, like Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978), in which it could be said that the separate-judgment requirement of Rule 58 was waived, and somehow the

March 21 Order may be deemed a judgment within the meaning of Rule 58. It is clear the district court did not intend the March 21 Order to constitute a judgment because the court specifically directed the entry of a separate judgment on attorneys' fees and asked for more briefing regarding costs. Its explicit direction for the entry of a judgment for attorneys' fees, which appeared twice in the order, demonstrates the district court contemplated a separate (and proper) judgment under Rule 58. App. 14 and 29. It also is clear from the March 21 Order, which instructed that judgment be entered only for attorneys' fees and withheld any similar instruction for costs, and from the face of the Attorneys' Fees Judgment, that the judgment did not pertain to costs but only to attorneys' fees.

The court of appeals, however, deemed the March 21 Order to be an appealable Rule 58 judgment. It stated in its decision that Federal appealed "from the district court's original judgment for attorney's fees and costs in the action." App. 69. (emphasis added). The only document which treated attorneys' fees and costs was the March 21 Order. The Attorneys' Fees Judgment, also entered on March 21, dealt only with attorneys' fees.

The court of appeals proceeded to rule that Federal's notice of appeal was "premature and ineffective" because it was filed prior to disposition of "timely served motions to alter or amend the judgment. . . ." Id. The only timely served motions, however, were those of Fairfield, Federal, and Main, and they addressed only issues regarding

costs presented by the March 21 Order. App. 34 and 41. The court of appeals evidently ruled that because the motions to alter or amend as to costs addressed one portion of the March 21 Order, the time for appeal of all aspects of the March 21 Order, including attorneys' fees issues, was extended until disposition of the motions. See F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago, 739 F.2d 284 (7th Cir. 1984) (time for all parties to appeal tolled even if only one party files Rule 59(e) motion directed at only one part of the judgment).

The court of appeals erred fundamentally in deeming the March 21 Order a Rule 58 judgment. Its opinion conflicts with Huecker v. Milburn, 538 F.2d 1241 (6th Cir. 1976), which requires that post-judgment attorneys' fees awards comply with Rule 58

requirements. The Court should grant certiorari in this case and require that Rule 58 be uniformly applied in post-judgment rulings.

B. The Court of Appeals Incorrectly Held The Motions To Alter Or Amend, Which Did Not Challenge The Substantive Correctness Of The Attorneys' Fees Judgment, Tolloed The Time For Appeal

The court of appeals ruled that because "timely served motions to alter or amend the judgment were still pending . . . [Federal's] notice of appeal filed prior to the disposition of such motions [was] premature and ineffective" App. 69. This ruling conflicts squarely with the principles behind the Court's rulings in White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982); Budinich v. Becton Dickinson & Co., 486 U.S. 196, 108 S.Ct. 1717 (1988); and Buchanan v.

Stanships, Inc., 485 U.S. 265, 108 S.Ct. 1130 (1988). The rationale of these cases is that certain post-judgment motions, such as ones for attorneys' fees and costs, are collateral to the judgment on the merits, and will not trigger the tolling provisions of Federal Rule of Appellate Procedure 4(a)(4). Thus, with regard to motions to alter or amend judgments, "federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits." White v. New Hampshire Department of Employment Security, 455 U.S. at 451. It is well settled that courts will assess the function of a motion, and disregard its label, in determining whether it triggers Rule 4(a)(4). Buchanan v. Stanships, Inc. (application for costs

styled as a "Motion to Alter or Amend Judgment" treated as motion under Rule 54(d), not 59(e)).

In this case, the judgment on appeal was the Attorneys' Fees Judgment, and it dealt only with attorneys' fees, and not with costs. The court of appeals ruled, however, that two motions denominated as "motions to alter or amend the judgment" triggered Rule 4(a)(4) even though they did not pertain to attorneys' fees. The motions concerned only costs, and there was nothing about them which challenged the substantive correctness of the Attorneys' Fees Judgment.

The court of appeals ruling was incorrect, and the Court should grant certiorari and clarify that Rule 59 of the Federal Rules of Civil Procedure and Rule 4(a)(4) of the Federal Rules of

Appellate Procedure apply with equal force to post-merits judgment determinations such as attorneys' fees awards. The Court also should amplify the principles which underpin its rulings concerning the interplay of Rule 59 and Rule 4(a)(4) to clarify that post-judgment motions, regardless of their labels, will not trigger Rule 4(a)(4) unless they challenge the substantive correctness of the judgment.

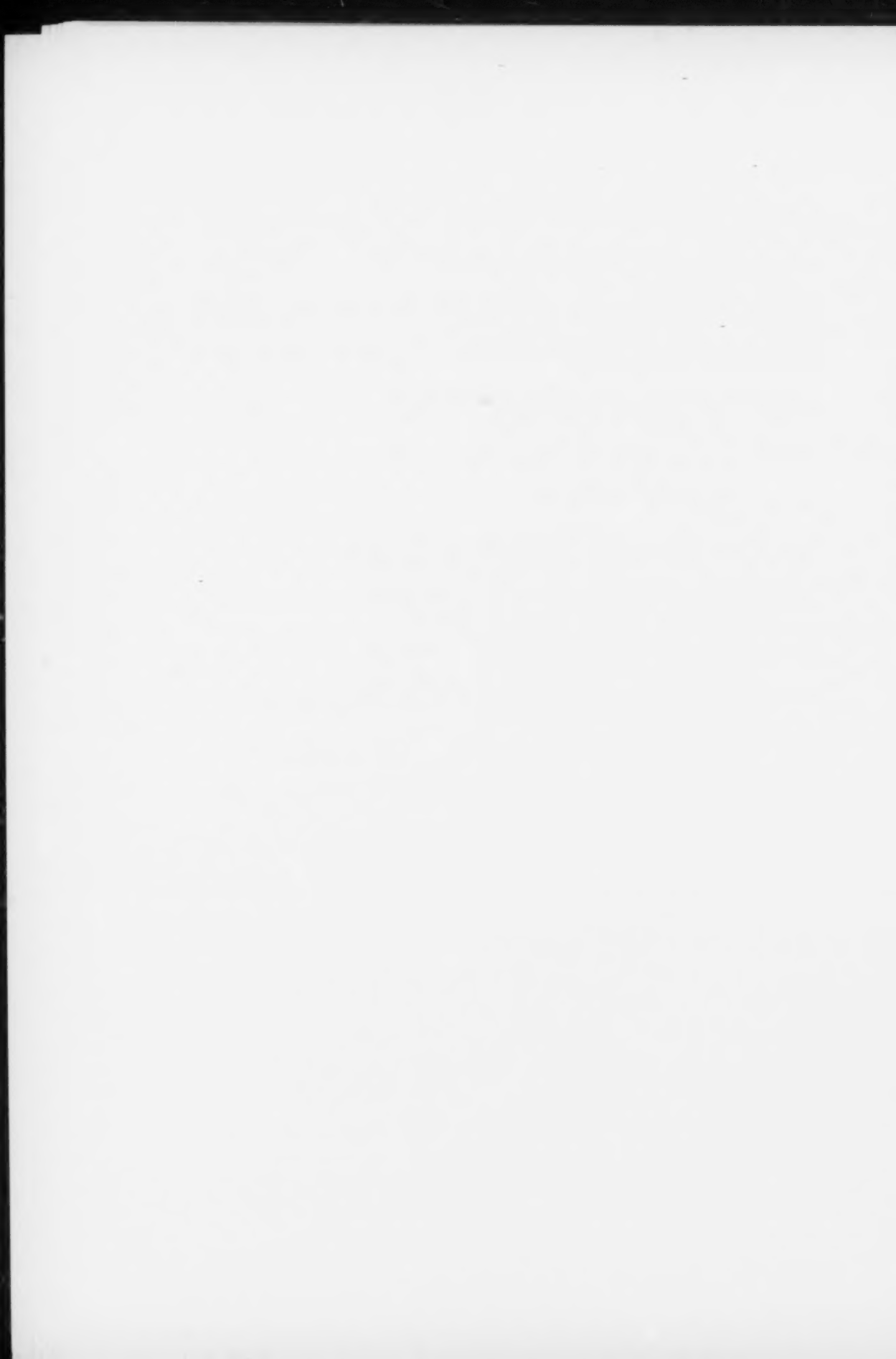
CONCLUSION

For all of the foregoing reasons,
this Petition for Writ of Certiorari to
the United States Court of Appeals for
the Eleventh Circuit should be granted.

Respectfully submitted,

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APPENDIX TO PETITION
FOR WRIT OF CERTIORARI

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App. 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 83-1394 Civ-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,

Plaintiff,

v.

CITY OF LAKE LAND,

Defendant/Counterclaimant,

v.

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION, etc. et al.,

Counterclaim Defendants.

CHAS T. MAIN, INC.,

Counterclaim Defendant/
Third-Party Plaintiff,

v.

THE MUNTERS CORPORATION, et al.,

Third-Party Defendants.

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O R D E R

A jury trial was conducted concerning the coal handling system in this case from February 6, 1989 through March 2, 1989. Pursuant to a jury verdict, judgment was entered for the City of Lakeland ("Lakeland") against Fairfield Engineering Company and Federal Insurance Company (collectively "Fairfield"), and for Chas. T. Main, Inc. ("Main") against Fairfield. The Clerk has taxed costs in favor of Lakeland and Main. Before the Court are Lakeland's motion for an award of attorney's fees against Federal Insurance Company ("Federal"), Main's motion for an award of attorney's fees against Fairfield, and Fairfield's motions pursuant to F.R.Civ.P. 54(d) to review the costs taxed by the Clerk in favor of Lakeland and Main.

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I. Lakeland's Motion for Attorney's Fees

Lakeland has requested that the Court tax against Federal, pursuant to section 627.756, Florida Statutes, the reasonable attorney's fees incurred by Lakeland in connection with the trial of the coal handling claim. Section 627.428, Florida Statutes (1987), permits the recovery of attorney's fees when an insured recovers a judgment against an insurer. Section 627.756, Florida Statutes (1987) provides that:

Section 627.428 applies to suits brought by owners, subcontractors, laborers, and materialmen against a surety insurer under payment or performance bonds written by the insurer under the laws of this state to indemnify against pecuniary loss by breach of a building or construction contract. Owners, subcontractors, laborers, and materialmen shall be

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deemed to be insureds or
beneficiaries for the
purposes of this section.

Federal has opposed Lakeland's motion
for attorney's fees on a number of
grounds.^{1/}

Federal first contends that because
Fairfield's contract with Lakeland was
simply to supply prefabricated equipment
to the job site, and did not entail any
installation, erection or construction,
the contract was not a "building or
construction contract" within the

^{1/} Federal has renewed its argument
that Lakeland's motion for an
extension of time to file its motion
for attorney's fees was untimely
based on Local Rule 4.18,
M.D.Fla.Rules. The motion for fees
is deemed timely pursuant to the
Orders entered on May 24 and June 6,
1989, extending the time for
Lakeland to file its motion for
attorney's fees.

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meaning of the statute. Federal thus contends that because section 627.756 only applies to "building or construction contracts," Lakeland may not rely on it as a basis for an award of fees.

It appears that no Florida court has explicitly addressed the question whether a contract to supply materials to a construction site for a construction project may be considered a building or construction contract within the meaning of the statute. However, because the statute specifically states that section 627.428 applies to suits brought by materialmen, the term, "building or construction contract" must

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include a contract to supply materials at a job site.^{2/}

Federal next contends that the Court should deny Lakeland's motion for attorney's fees because Lakeland's claim against Fairfield involved factual and legal issues which Federal could not reasonably be expected to resolve on its own. Despite the mandatory language of section 627.428, Florida courts have held that an award of fees is inappropriate unless "the [insurance] company wrongfully caused the parties to resort to litigation by not resolving the

^{2/} Although the Court could locate no cases in which a prevailing party sought an award of fees against the surety of a supplier of materials, courts have granted attorney's fee awards to suppliers of materials. See, e.g., United States f/u/b/o Vulcan Materials v. Volpe Constr., 622 F.2d 880, 886-87 (5th Cir. 1980).

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conflict when it was reasonably within the company's power to do so." Crotts v. Bankers & Shippers Ins. Co., 476 So.2d 1357, 1358 (Fla. 2nd DCA 1985) (emphasis added). Federal contends that it stood in the same position as the insurance carrier in Crotts, supra, where the court held that the prevailing party was not entitled to attorney's fees under section 627.428. Unlike the present case, however, Crotts involved an interpleader action by the insurance carrier in response to the assertion of competing claims to the proceeds of the policy by the beneficiary and an assignee of the beneficiary. Simply because Lakeland claimed that both Main and Fairfield were partially at fault, and Fairfield claimed that it was not at fault, does not absolve Federal of

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liability for attorney's fees under section 627.756.

Lakeland seeks an award of attorney's fees in the amount of \$426,417.08.^{3/} In support of its motion for attorney's fees, Lakeland has submitted an affidavit of Michael B. Colgan and a summary of the services rendered by Holland & Knight attorneys, paralegals, and staff. The summary describes the services rendered, identifies the amount of time spent in

^{3/} This request is based on the services rendered by Holland & Knight through April 30, 1989 and the services rendered by Mark Miller as Lakeland City Attorney through March 2, 1989. Lakeland also requested that the Court tax its expert witness fees as a part of the attorney's fee award. However, the Court's conclusion that the attorney's fee award is limited to 12.5 percent of the judgment makes it unnecessary to address this issue.

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connection therewith, and states the standard hourly rate for the individual rendering the service. Lakeland has also submitted an affidavit of Mark N. Miller which states that he devoted 247 hours to the litigation of the coal handling portion of this case, and describes the services he rendered. The Miller affidavit also opines that an hourly rate of \$125.00 would be fair and reasonable.

Federal contends that the time records submitted by Holland & Knight are not reliable and should not be used as a basis for calculating an attorney's fee award. Federal observes that Lakeland pursued coal handling claims against Main as well as Fairfield, and that for a substantial portion of this case Lakeland also pursued its limestone handling claims against Main and

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Fairfield, which involved many of the same witnesses as the coal handling claims. Fairfield thus contends that Lakeland's submissions fail to sufficiently separate fees incurred in litigating the coal handling claim against Fairfield from fees resulting from the other claims. The Court accepts the affidavit of Michael Colgan which states that the summary of hours represents time spent litigating the coal handling portion of the case and that any time not reasonably related to the litigation of this claim against Fairfield or Federal was "deducted in its entirety or apportioned and ratably reduced."

Considering the novelty and difficulty of the questions involved, and based on the summaries of services submitted in support of the motion, the

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Court concludes that the total number of hours claimed by Holland & Knight and Mark Miller is reasonable. Secondly, based on the skill required to perform the legal services properly, the customary fee for services of a similar nature, the experience, reputation and ability of the attorneys, and the nature and length of the relationship with the client, the Court finds that the hourly rates set forth in Exhibit 2 to the Colgan affidavit and the \$125.00 hourly rate claimed by Mark Miller are reasonable.

However, Federal contends that any fee award to which Lakeland is entitled must be limited to twelve and one half percent of the judgment recovered. Prior to October 1, 1982, section 627.756 limited the attorney's fee award to "not ... more than 12.5 percent of

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the amount which the judgment or decree awards such plaintiff under the bond (exclusive of the costs of suit and attorney fees or compensation)"

In L. Ross v. R. W. Roberts Constr. Co. 481 So.2d 484 (Fla. 1986), the Florida Supreme Court approved the decision of the Fifth District Court of Appeal which held that the twelve and one half percent limitation on fee awards applies to causes of action which accrued prior to October 1, 1982. Thus, if Lakeland's cause of action against Fairfield accrued prior to October 1, 1982, Lakeland's attorney's fee award is limited to twelve and one half percent of the judgment recovered.

As a general rule under Florida law, a cause of action accrues "when there has been notice of an invasion of legal rights or a person has been put

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on notice of his right to a cause of action." Kelley v. School Board of Seminole County, 435 So.2d 804, 806 (Fla. 1983). Federal has pointed to evidence in the record which establishes that Lakeland had knowledge of the defects in the coal handling system sufficient to put it on notice of its right to a cause of action prior to October 1, 1982.^{4/} Thus, Lakeland, is entitled to an award of fees in the amount of \$109,485.10, representing

^{4/} Lakeland has not rebutted, by motion for leave to reply or otherwise, Federal's showing that the cause of action occurred prior to October 1, 1982. The Court thus finds, for the purposes of Lakeland's motion for attorney's fees, that its coal handling claim against Fairfield accrued prior to October 1, 1982.

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twelve and one half percent of
\$875,880.86.^{5/}

Accordingly, the Clerk is directed to enter Judgment for the City of Lakeland and against Federal Insurance Company for a reasonable attorney's fee in the amount of \$109,485.10.

II. Main's Motion for Attorney's Fees

Main has filed a motion for sanctions and attorney's fees pursuant to Rule 11, F.R.Civ.P., and the inherent authority of the Court, against Fairfield Engineering Company, Inc. ("Fairfield").^{6/} Main contends that

^{5/} Lakeland recovered \$578,187.86 in the Judgment entered on March 2, 1989 and \$297,693.00 in the Judgment entered on June 29, 1989.

^{6/} With respect to the discussion of Main's motion for fees, "Fairfield" refers to Fairfield Engineering Company only, and does not include (Footnote continued on next page.)

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the third-party claims asserted against it by Fairfield were not well grounded in fact and that this would have been apparent to counsel for Fairfield had they conducted a reasonable prefiling inquiry.

Rule 11 requires that a party or attorney conduct a reasonable, prefiling inquiry into the facts and law of a case before signing a pleading. Donald v. Clerk, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc). The standard to be applied is one of reasonableness under the circumstances at the time the pleading was signed, a standard more stringent than the original good-faith formula of former Rule 11. Id.

(Footnote continued from previous page.)
Federal Insurance Company.

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Main contends that Fairfield's "entire case" against it was based on the allegation that Main was responsible for determining the dimensions of the rotary plow cap and that Main's selection of the wrong dimensions caused Fairfield's equipment to perform below capacity. As evidence that Fairfield's crossclaims against Main were not well grounded in fact and that Fairfield failed to conduct a reasonable, prefiling inquiry into the facts of the case, Main points to evidence in the record that contradicts Fairfield's allegations. Main also contends that no evidence was offered at trial in support of Fairfield's allegations.

Although the evidence in opposition to Fairfield's interpretation of its contract with the City of Lakeland was substantial, Fairfield submitted evidence at trial in support of its

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allegations that Main was responsible for determining the dimensions of the rotary plow cap. The Court concludes that Fairfield's evidentiary showing at trial was not so insubstantial as to demonstrate that Fairfield filed its crossclaims against Main without a reasonable prefiling inquiry into the factual basis for its claims. As Main points to no other basis for finding that Fairfield violated Rule 11,^{7/} Main is not entitled to an award of attorney's fees on this ground.

Main also requested an award of fees based on the Court's inherent power

^{7/} As Main identifies no other ground for imposing sanctions, Main's motion for oral argument (doc. #1331) is DENIED.

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to make such an award under the "bad-faith exception" to the American Rule. Based on the foregoing discussion with respect to Rule 11, Main is also not entitled to an award of fees based on this ground. Accordingly, Main's motion for sanctions is due to be denied.

III. Lakeland's Bill of Costs

The Clerk has taxed costs in the total amount of \$391,646.28 in favor of Lakeland (Doc. #1293). Lakeland seeks taxation of \$338,172.35 for expert witness fees under 28 USC §1920(3). Lakeland is not entitled to fees for its expert witnesses under section 1920(3) in excess of the limitations established by 28 USC §1821. See Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). Lakeland also sought to recover its expert witness fees as a component

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of its attorney's fee award, and requested that it be allowed to file an amended bill of costs in the event the Court denied recovery for its expert fees on these bases. As Lakeland may recover costs associated with its expert witnesses within the limitations established in 28 USC §1821, the Court RESERVES RULING on Fairfield's motion for review of Lakeland's bill of costs. Lakeland is directed to file within ten (10) days of the date of this Order a memorandum with accompanying documentation to support the taxing of costs associated with its expert witnesses within the limitations established in 28 USC §1821. Fairfield shall have five (5) days thereafter within which to respond.

IV. Main's Bill of Costs

Recoverable costs are described in
28 USC §1920 as follows:

(1) Fees of the
clerk and marshal;

(2) Fees of the
court reporter for all or
any part of the stenograph-
ic transcript necessarily
obtained for use in the
case;

(3) Fees and dis-
bursements for printing
and witnesses;

(4) Fees for exempli-
fication and copies of
papers necessarily obtain-
ed for use in the case;

(5) Docket fees
under section 1923 of this
title;

(6) Compensation of
court appointed experts,
compensation of interpre-
ters, and salaries, fees
expenses, and costs of
special interpretation
services under section
1828 of this title.

Absent an explicit statutory or contract-
ual authorization for the taxation of
litigation expense, federal courts are
bound by the limitations set forth in

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section 1920 of title 28. Crawford Fitting Co. v. J. T. Gibbons, Inc., 107 S.Ct. 2494, 2499 (1987).

The Clerk has taxed costs in the total amount of \$288,336.59 for Main (doc. #1295). Fairfield has objected to several items of costs submitted by Main and contends that costs should be re-taxed in an amount not to exceed \$2,669.25. Main seeks \$19,062.38 for deposition transcripts. Fairfield contends that many of these depositions involved the claims between Lakeland and Main, rather than the claims between Main and Fairfield. Fairfield thus contends that Main is seeking to tax these costs against it contrary to the Court's Order entered February 8, 1989, which required that Main and Lakeland bear their own costs with respect to the claims they settled. Fairfield also

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contends that Main is seeking to tax costs associated with its claims against Fairfield on which Fairfield prevailed prior to trial.

Main responds^{8/} that Fairfield's crossclaims sounding in contribution, indemnity and negligence mirrored the claims asserted against it by Lakeland, such that the costs incurred with respect to the coal handling litigation were attributable equally to Fairfield and Lakeland. Thus, Main contends that it would be impossible or impracticable to apportion the costs incurred by Main

^{8/} Main's motion for leave to file a response (doc. #1349) is GRANTED and the Clerk is directed to file the response attached to the motion. Fairfield's motion for leave to file a reply (doc. #1364) is GRANTED and the Clerk is directed to file the reply attached to the motion.

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between its defense of Lakeland's claims and its defense of Fairfield's claims. Although Main's defense of Lakeland's claims was not identical to its defense of Fairfield's claims, the Court concludes that the issues raised were sufficiently similar and overlapping that apportionment would be impracticable.

The Court finds that the depositions for which Main seeks reimbursement were reasonably necessary for use in the case at the time they were taken. However, \$2857.36 represents costs for copies, express mailing, computer disk copies, and duplication of video tapes which were incurred for the convenience of counsel and are therefore not recoverable. Moreover, Main is not entitled to \$1495.56 representing costs incurred for

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depositions for which no documentation was included in exhibit # 1 to its bill of costs.^{9/}

Main seeks to tax \$2916.36 for trial transcripts. The Court concludes that the transcript of the summary bench trial and the hourly, daily or expedited transcriptions of the jury trial were for the convenience of counsel and not necessary for use in the case. The Court will allow \$689.25 representing the cost of 919 pages of transcripts at a reasonable rate of \$.75 per page. Main also seeks reimbursement of \$15,115.35 for computer services

^{9/} The depositions without documentation are those of P. Gorman, J. Sayler, E. Coulter, J. Alger, W. White, E. McCreery, M. McFann, D. VanSickle, E. Smeltzer, and R. Tucker.

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utilized to computer portions of deposition testimony. As these costs were incurred for the convenience of counsel, they are not recoverable.

Fairfield objects to \$389.00 in service of process fees for independent process servers. Fairfield contends that the costs of a private process server is not a "[f]ee of the ... marshal," and is therefore not recoverable under section 1920(1). Since the enactment of section 1920, the method for serving civil summonses and subpoenas has changed in that the use of private process servers has generally been substituted for the U.S. Marshal Service. See Roberts v. Homelite Div. of Textron, Inc., 117 F.R.D. 637, 641 (N.D. Ind. 1987) (allowing recovery of costs for private process servers under 1920(1)). Although this change suggests

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that costs for private process servers should be recoverable, the Court is bound by the language of section 1920(1). Accordingly, Main's costs for private process servers are not recoverable. Accord Viacao Aerea Sao Paulo v. Int'l Lease Finance Corp., 119 F.R.D. 435 (C.D. Cal. 1988).

Fairfield objects to reimbursement of \$2,652.96 for the expenses incurred by Main employees W. Wilcoxson and R. A. Cochran in attending depositions of other witnesses. The Court concludes that these costs were incurred for the convenience of counsel. The charges by Stone and Webster in the amount of \$13,695.97 for the consultation services of J. R. Becker and J. Newell (former employees of Main) also were incurred for the convenience of counsel. Main also seeks reimbursement in the amount

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of \$13,834.17 for expenses incurred during the trial for airfare, travel, food and overnight accommodations by Main employees Wilcoxson, Cochran, and Becker. The attendance of these persons as representatives of the corporation was for the convenience of counsel.

Main also seeks to tax \$21,562.73 incurred by counsel and representatives of Main for travel, lodging and subsistence expenses relating to the attendance of depositions. These expenses are not recoverable under section 1920. The costs incurred by Main's counsel, employees and experts in traveling to other Fairfield rotary plow installations for investigative purposes (\$4787.10) also are not recoverable under section 1920. Main's expert fees in the amount of \$66,279.47 also are not recoverable.

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Fairfield has objected to Main's request for \$28,527.03 representing subsistence and lodging expenses of counsel for Main during the trial. As Main has not identified any provision of 28 USC §1920 to support the taxing of these costs, the Court declines to tax these expenses. Main also seeks \$70,849.45 for long distance telephone charges, postage costs and duplicating expenses. These expenses represent overhead and are not recoverable.

Fairfield objects to \$16,824.62 in "miscellaneous" expenses for models, photo reproductions, copies of depositions and blueprints, and legal fees (section 10 of Main's bill of costs). The Court concludes that these expenses were not reasonably necessary for use in the case and are not allowed.

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The costs taxed by the Clerk in favor of Main and against Fairfield in the amount of \$288,336.59 must, therefore, be reduced by \$195,332.53. Thus, Main is entitled to \$93,004.06 in costs against Fairfield relating to the trial of the coal handling claim.

Upon due consideration, therefore,
IT IS ORDERED:

1. Lakeland's motion for attorney's fees (doc. #1292) is GRANTED and the Clerk is directed to enter Judgment for the City of Lakeland and against Federal Insurance Company for a reasonable attorney's fee in the amount of \$109,485.10.

2. Main's motion for attorney's fees (doc. #1298) is DENIED.

3. Main's motion for oral argument (doc. #1331) is DENIED.

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4. The Court RESERVES RULING on Lakeland's Bill of Costs and Lakeland is directed to file within ten (10) days from the date of this Order a memorandum with accompanying documentation to support the taxing of costs associated with its expert witnesses within the limitations set forth in 28 USC § 1821. Fairfield shall have five (5) days thereafter within which to respond.

5. Main's motion for leave to file a response (doc. #1349) is GRANTED and the Clerk is directed to file the response attached to the motion.

6. Fairfield's motion for leave to file a reply (doc. #1364) is GRANTED and the Clerk is directed to file the reply attached to the motion.

7. The taxation of costs in Main's Bill of Costs is sustained to the extent

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of \$93,004.06, but in all other respects
is withdrawn and set aside.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida,
this 21st day of March, 1990.

Wm. Terrell Hodges
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Case No. 83-1394-Civ-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,

v.

CITY OF LAKE LAND

JUDGMENT IN A CIVIL CASE

—
☐ Jury Verdict. This action came
before the Court for a trial by
jury. The issues have been tried
and the jury has rendered its
verdict.

—
☒ Decision by Court. This action
came to trial or hearing before the
Court. The issues have been tried

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Oor heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Judgment is entered for the CITY OF LAKELAND and against FEDERAL INSURANCE COMPANY for a reasonable attorney's fee in the amount of \$109,485.10.

Date: March 21, 1990

David L. Edwards
Clerk

(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 83-1394-Civ-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,

Plaintiff,

v.

CITY OF LAKE LAND,

Defendant/
Counterclaimant,

v.

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION, ST. PAUL
FIRE AND MARINE INSURANCE
COMPANY, FAIRFIELD ENGINEERING
COMPANY, FEDERAL INSURANCE
COMPANY, CHAS. T. MAIN, INC.,
BLOUNT INTERNATIONAL, LTD.,
UNITED STATES FIDELITY AND
GUARANTY COMPANY, AETNA
CASUALTY AND SURETY COMPANY,
FIREMAN'S FUND INSURANCE
COMPANY, A. O. SMITH-INLAND
INC., AND ARMCO, INC.,

Counterclaim
Defendants.

FAIRFIELD ENGINEERING COMPANY'S
AND THE FEDERAL INSURANCE COMPANY'S
JOINT MOTION TO ALTER OR AMEND
THE JUDGMENT AND MEMORANDUM OF LAW
IN SUPPORT

Come now Fairfield Engineering Company, Inc. and The Federal Insurance Company (collectively "Fairfield"), Counterclaim Defendants, and move this Court to alter or amend the Judgment and Order entered March 21, 1990, and state:

(1) In its Bill of Costs the Clerk taxed in favor of Main \$288,336.59.

(2) On March 21, 1990 this Court entered an Order taxing costs in favor of Chas. T. Main, Inc. and against Fairfield in the amount of \$93,004.06.

(3) From the total costs sought by Main (\$288,336.59) the Court deducted \$195,332.53, leaving a balance of \$93,004.006.

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(4) The total of the individual costs disallowed by the Court in its Opinion, however, were \$270,087.88 and not \$195,332.53. Accordingly, the correct amount of taxable costs should be \$18,238.71 and not \$93,004.06.

(5) The Court's Order should be amended to correct this mathematical mistake and to reduce the award of costs to Main to the sum of \$18,238.71.

Respectfully submitted,

John L. Ashworth
ASHWORTH & MCKINNISS
255 Executive Drive
Marion, Ohio 43302
Telephone: 614/387-0692

MEMORANDUM IN SUPPORT

Following the coal handling trial Chas. T. Main submitted, and the Clerk taxed against Fairfield, a Bill of Costs

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seeking the recovery of \$288,336.59. Fairfield objected to all but \$2,669.25. In its Judgment dated March 21, 1990 the Court addressed Main's itemized bill and disallowed a total of \$270,097.88, leaving a net taxable amount of \$18,238.71. The Court, however, through a mathematical miscalculation, concluded that Main's Bill of Costs was to be reduced by \$195,332.53. As a result the Court awarded Main costs in the amount of \$93,004.06. In light of the Court's rulings, the Order is apparently the result of a mathematical error. The proper amount taxable against Fairfield should have been \$18,238.71. Attached hereto and made a part hereof is Exhibit A which itemizes Main's Bill of Costs by

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category and shows the amounts allowed/disallowed by the Court in its March 21, 1990 Judgment and Order.

Main sought deposition transcript fees of \$19,062.38. The Court allowed \$14,709.46 and disallowed \$2,857.36 for copies, etc. as well as \$1,495.56 for undocumented claims. Main sought to tax \$2,916.36 for trial transcripts. The Court allowed \$689.25. Main's request for reimbursement of \$15,115.35 in computer service charges was rejected in toto by the Court. For witness and process fees Main sought \$3,229.00. The Court allowed \$2,840.00 and disallowed \$389.00.

Main's attempt to collect attendance expenses of Wilcoxson and Cochran (\$2,652.96), consultation service charges by Stone and Webster (\$13,695.97) and trial expenses of Main employees (\$13,834.17) were summarily

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rejected by the Court as being "for the convenience of counsel." Additionally, the Court determined that the following amounts were not recoverable under 28 USC § 1920: \$21,562.73 in costs incurred by counsel for Main for travel, lodging and subsistence expenses relating to the attendance of depositions; \$4,787.10 in travel expenses to investigate other Fairfield rotary plow installations; expert fees of \$66,279.47; \$28,527.03 in subsistence and lodging expenses of counsel during trial; overhead expenses totalling \$79,849.45; and \$16,824.62 in miscellaneous expenses.

Thus, Fairfield believes the Court incorrectly added some costs that were disallowed in reaching the amount of costs taxable in favor of Main. For these reasons Fairfield requests that

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its Motion to Alter or Amend the
Judgment be granted.

John L. Ashworth
ASHWORTH & McKINNISS
255 Executive Drive
Marion, Ohio 43302
Telephone: 614/387-0692
Attorneys for The Fairfield
Engineering Company and The
Federal Insurance Company

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-1394-Civ-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,

Plaintiff,

v.

CITY OF LAKELAND,

Defendant/Counterclaimant,

v.

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION, etc., et al.,

Counterclaim Defendants.

CHAS. T. MAIN, INC.

Counterclaim Defendant/
Third-Party Plaintiff,

v.

THE MUNTERS CORPORATION, et al.,

Third-Party Defendants.

CHAS. T. MAIN, INC.'S MOTION TO ALTER
OR AMEND JUDGMENT AND MEMORANDUM OF LAW
IN SUPPORT

Counterclaim Defendant, CHAS. T. MAIN, INC., by counsel, pursuant to Rule 59(e), Federal Rules of Civil Procedure, moves the Court to amend its Judgment and Order entered March 21, 1990, and states:

1. On March 21, 1990, this Court entered an Order taxing costs in favor of CHAS. T. MAIN, INC. [hereinafter "MAIN"], and against Fairfield Engineering Company and Federal Insurance Company [collectively "FAIRFIELD"] in the amount of \$93,004.06 [Ninety-Three Thousand Four Dollars and 06/100], but denied taxation of \$1,495.56 [One Thousand Four Hundred Ninety-Five Dollars and 56/100] for depositions itemized, but for which no bills were attached in the bill of costs. [Order, docket no. 1392, page 11].

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2. This Court's Order should be altered or amended to include the taxation of the \$1,495.56 as taxable costs in favor of MAIN and against FAIRFIELD because MAIN has complied with all the requirements of 28 U.S.C. Sections 1920 and 1924 for the taxation of those costs.

MEMORANDUM OF LAW

3. 28 U.S.C. Section 1920 requires that a bill of costs be filed in a case where the costs are sought to be taxed. A bill of costs is defined as "a certified, itemized statement of the amount of costs in an action or suit." Black's Law Dictionary, 5th Edition, (1979). MAIN's submitted a bill of costs which itemized the costs incurred by MAIN for depositions and which separately listed the charges for the

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ten depositions at issue in this motion.

4. MAIN also complied with 28 U.S.C. Section 1924 by the affirmation/affidavit made by Denise G. Morris, Esquire, in support of the bill of costs and contained within the bill of costs form used.

5. Through administrative oversight, the documentation (copies of bills) for the depositions was inadvertently omitted from the attachment to the bill of costs. Those missing copies are attached to this Motion as Exhibit "A".

6. Where a party has complied with the requirements of Sections 1920 and 1924 of Title 28, it is improper to fail to tax costs in favor of the Plaintiff as a prevailing party. Women's Federal Savings and Loan Association of Cleveland v. Nevada National Bank, 108

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F.R.D. 396 (D. Nevada 1985).

WHEREFORE, CHAS. T. MAIN, INC., respectfully requests this Court enter an Order amending its Order of March 21, 1990, and increasing the costs taxable in favor of CHAS. T. MAIN, INC., to \$94,499.62 [Ninety-Four Thousand Four Hundred Ninety-Nine Dollars and 62/100].

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 29th day of March, 1990, to all counsel of record as they appear on the attached service list.

DENISE G. MORRIS, ESQUIRE
Florida Bar No. 348562
FISHER, RUSHMER, WERREN RATH,
KEINER, WACK & DICKSON, P.A.
20 North Orange Avenue
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Post Office Box 712
Orlando, Florida 32802
(407) 843-2111

Attorneys for CHAS. T. MAIN,
INC.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 83-1394-CIV-T-10

ECODYNE COOLING DIVISION
OF ECODYNE CORPORATION,

Plaintiff,

v.

CITY OF LAKELAND,

Defendant/Counterclaim,

v.

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION, et al.,

Counterclaim
Defendants.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Federal Insurance Company ("Federal"), counter-claim defendant and cross-claimant, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from:

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1. The Judgement for attorney's fees of \$109,485.10 in a Civil Case in favor of plaintiff City of Lakeland and against Federal Insurance Company entered on March 21, 1990.

Respectfully submitted,

John L. Ashworth
Ted M. McKinniss
ASHWORTH & MCKINNISS
255 Executive Drive
Marion, Ohio 43302
Telephone: (614) 387-0692
Attorneys for Federal
Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. mail this 20th day of April, 1990, upon all persons named in the attached Service List.

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D. James Kadyk, ESQUIRE
MACFARLANE, FERGUSON,
ALLISON & KELLY
P.O. Box 1531
Tampa, Florida 33601
(813) 223-2411
Attorneys for The Federal
Insurance Company

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 83-1394 Civ-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,

Plaintiff,

v.

CITY OF LAKE LAND,

Defendant/Counterclaimant,

v.

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION, etc., et al.,

Counterclaim Defendants.

CHAS T. MAIN, INC.,

Counterclaim Defendant/
Third-Party Plaintiff,

v.

THE MUNTERS CORPORATION, et al.,

Third-Party Defendants.

O R D E R

A jury trial was conducted in the coal handling system portion of this case from February 6, 1989 through March 2, 1989. Pursuant to a jury verdict, judgment was entered for the City of Lakeland ("Lakeland") against Fairfield Engineering Company and Federal Insurance Company (collectively "Fairfield"), and for Chas. T. Main, Inc. ("Main") against Fairfield. By an Order entered on March 21, 1990, the Court granted Lakeland's motion for an award of attorney's fees denied Main's motion for an award of fees, taxed costs in favor of Main and reserved ruling on Lakeland's bill of costs. Before the Court are pending motions by the parties.

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I. Main's Motion to Alter or Amend

Counterclaim Defendant Main moves pursuant to Rule 59(e), F.R.Civ.P., to alter or amend that portion of the Court's March 21 Order that denied taxation of \$1,495.56 for deposition costs. These costs were denied because they were not supported by documentation. As Main has attached the missing documentation to its motion, the Court will reconsider the taxability of these items of costs.

The Court concludes that these depositions were reasonably necessary for use in the case. However, Main again seeks to recover costs for copies, express mailing and computer disk copies. These charges are for the convenience of counsel and are therefore not recoverable. Also, three of the invoices which include non-taxable items are not

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itemized so that the Court is unable to determine which of the expenses on these invoices are properly taxable. Accordingly, Main is entitled to \$596.96 with respect to these depositions.

Upon due consideration, therefore, Main's motion to alter or amend the judgment (doc. #1394) is due to be granted.

II. Fairfield's Motion to Alter or Amend

Fairfield moves to alter or amend that portion of the March 21 Order that awards Main costs in the amount of \$93,004.06. This figure resulted from a mathematical miscalculation. Review of the Court's March 21 Order shows that \$270,097.88, rather than \$195,332.53, should have been deducted from the amount of costs sought to be taxed by Main (\$288,336.59). Thus, Main is entitled to costs in the amount of \$18,835.67 (including the \$596.96

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associated with the additional depositions) rather than \$93,004.06. Accordingly, Fairfield's motion to alter or amend the March 21 Order (doc. #1396) is due to be granted.

III. Lakeland's Motion to Reconsider

Lakeland has filed a motion for reconsideration of the Court's March 21 Order pursuant to Rule 52(b), F.R.Civ.P. In that Order the Court concluded that, for purposes of Lakeland's motion for attorney's fees, Lakeland's cause of action against Fairfield accrued prior to October 1, 1982. The Court thus limited Lakeland's award of attorney's fees to twelve and one half percent of the judgment recovered as required by Section 627.756, Florida Statutes, as in effect prior to October 1, 1982. Lakeland contends that record evidence demonstrates that its

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cause of action did not accrue until October 14, 1982, so that the twelve and one-half percent cap should not apply. Lakeland thus requests the Court to make amended factual findings on this issue and to amend the Judgment accordingly.

A motion to reconsider, whether made pursuant to Rule 52(b) or Rule 59(e), must be made "not later than ten days after entry of the judgment." This ten day time period is jurisdictional, see Gribble v. Harris, 625 F.2d 1173, 1174 (5th Cir. 1980), and cannot be extended by the Court. See Rule 6(b), F.R.Civ.P. Judgment was entered on March 21, 1990. Excluding intervening Saturdays and Sundays, Lakeland's motion

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was required to be made by April 4, 1990.^{1/}

Lakeland's motion for reconsideration was served and filed on April 6, 1990, the Court is without jurisdiction to consider it.

IV. Lakeland's Bill of Costs

Fairfield has moved pursuant to F.R.Civ.P. 54(d) to review the costs taxed by the Clerk in favor of Lakeland. The Court's March 21 Order reserved ruling on Lakeland's bill of costs to allow Lakeland to seek taxation of costs associated with its expert

^{1/} The ten day time periods in Rule 52(b) and 59(e) commence from the entry of judgment. Thus, the additional three days allowed in F.R.Civ.P. 6(e), where a party is required to take some action within a prescribed period following service of a document and service is made by mail, does not apply.

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witnesses within the limitations set forth in 28 USC § 1821. Lakeland's bill of costs is now ripe for decision.

Recoverable costs are described in 28 USC § 1920 as follows:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

Absent an explicit statutory or contractual authorization for the taxation of litigation expense, federal courts are bound by the limitations set forth in section 1920 of title 28. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482

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U.S. 437 (1987). The Clerk has taxed costs in the total amount of \$391,646.28 in favor of Lakeland (Doc. #1293). Fairfield has objected to several items of costs submitted by Lakeland and contends that costs should be re-taxed in an amount not to exceed \$6,559.77. Lakeland seeks \$981.40 for summons and subpoena fees under 28 USC § 1920(1). Fairfield contends that the costs of a private process server is not a "[f]ee of the ... marshal," and is therefore not recoverable under this section. Thus, Fairfield objects to \$945.90 of this amount. Since the enactment of section 1920, the method for serving civil summonses and subpoenas has changed in that the use of private process servers has generally been substituted for the U.S. Marshal Service. See Roberts v. Homelite Div.

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of Textron, Inc., 117 F.R.D. 637, 641 (N.D. Ind. 1987) (allowing recovery of costs for private process servers under 1920(1)). Although this change suggests that costs for private process servers should be recoverable, the Court is bound by the language of section 1920(1). Accordingly, Lakeland's costs for private process servers are not recoverable. Accord Viacao Aerea Sao Paulo v. Int'l Lease Finance Corp., 119 F.R.D. 435 (C.D. Cal. 1988).

Fairfield objects to Lakeland's request for \$7,151,50 for daily trial transcripts and computer conversion expenses. Such fees are properly taxable for "all or any part of the stenographic transcript necessarily obtained for use in the case." 28 USC 1920(2). The Court finds that the computer conversion and daily copy were

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for the convenience of counsel and were not necessary for use in the case. However, the Court will allow a reasonable rate of \$.75 per the 1,582 pages of transcripts for a total of \$1,186.50.

Lakeland seeks \$25,546.94 as costs associated with deposition transcripts. Fairfield contends that only six of these depositions were necessary for use in the case. The Court finds that the depositions for which Lakeland seeks costs were reasonably necessary for use in the case. The Court will allow as taxable costs the attendance fees, travel and mileage expenses, and postage costs attributable to the court reporter in the amount of \$2,229.83. However, the Court concludes that the costs of videotaping depositions that were also stenographically recorded (\$3,494.84)

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and the costs for storing certain depositions on disks (\$2,044.15) were incurred for the convenience of counsel and are therefore not recoverable.

Lakeland seeks taxation of \$695.86 for non-expert witness fees. Fairfield objects to \$223.86 for deposition attendance fees of non-expert witnesses. The Court finds that the depositions were reasonably necessary for use in the case and these costs are therefore recoverable.

Lakeland sought \$338,172.35 for expert witness fees under section 1920(3). Lakeland is not entitled to fees for its expert witnesses under section 1920(3). See Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437 (1987). However, pursuant to the Court's March 21 Order, Lakeland has submitted a supplemental memorandum with

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attached documentation to support taxation of its expert witnesses' costs within the limitations established in 28 USC §1821. Lakeland is entitled to witness attendance fees of \$30.00 per day, the witnesses' travel expenses, and a subsistence allowance of \$50.00 per day. Accordingly, the following costs are taxable for Lakeland's four expert witnesses:^{2/} \$150.00 in attendance fees, \$250.00 in subsistence allowances, and travel expenses in the amount of \$2863.40.^{3/}

Lakeland seeks taxation of \$4,261.02 for exhibits and photographs pursuant to §1920(4). Fairfield objects

^{2/} Dr. Yu testified on two days while the other three experts testified on one day.

^{3/}

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to Lakeland's claim for \$3,029.41 in charges for copies of Fairfield trial exhibits, \$750 for production of the videotape shown at trial, and \$377.36 for photo enlargements of exhibits. The Court finds that the copies of Fairfield's exhibits were not necessary for use in the case, but that the other expenses are recoverable. Accordingly, \$1,231.61 of these expenses are allowed.

Lakeland also seeks \$6,000.28 for photocopying expenses. Photocopying expenses constitute overhead and are not recoverable as costs. Lakeland seeks \$8,158.89 for computer costs, including computerized legal research, an \$29,318.94 for travel, lodging and subsistence expenses incurred by counsel and representatives of Lakeland. These expenses are not recoverable under section 1920 and are, therefore, not allowed.

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To summarize, Lakeland is entitled to \$7.50 as a service of summons fee, \$1,186.50 in court reporters' fees involving trial transcripts, \$20,007.95 for court reporters' fees involving depositions, \$695.86 for non-expert witness fees, \$3,263.40 for expert witness fees, and \$1,231.61 for exhibits and photographs. Accordingly, Lakeland is entitled to costs in the total amount of \$26,392.82.

Upon due consideration, therefore,
IT IS ORDERED:

1. Main's motion to alter or amend (doc #1394) and Fairfield's motion to alter or amend (doc #1396) are GRANTED. The Court's March 21 Order is AMENDED to sustain the taxation of Main's Bill of Costs in the amount of \$18,835.67 rather than \$93,004.06. The Clerk is directed to enter judgment accordingly.

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2. Lakeland's motion for reconsideration (doc #1397) is DENIED.

3. The taxation of costs in Lakeland's Bill of Costs is sustained to the extent of \$26,392.82, but in all other respects is withdrawn and set aside. The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

DONE AND ORDERED at Tampa, Florida
this 6th day of July, 1990.

/s/ Wm. Terrell Hodges
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Case No. 83-1394-Civ-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,
a Delaware Corporation

v.

CITY OF LAKE LAND

JUDGMENT IN A CIVIL CASE

—
☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

—
☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

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IT IS ORDERED AND ADJUDGED The Court's order of March 21, 1990 is AMENDED to sustain the taxation of Main's Bill of Costs in the amount of \$18,835.67 rather than \$93,004.06. The taxation of costs in Lakeland's Bill of Costs is sustained to the extent of \$26,392.82, but in all other respects is withdrawn and set aside.

Date: August 7, 1990

David L. Edwards
Clerk

(By) Deputy Clerk

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-3368

ECODYNE COOLING DIVISION OF ECODYNE
CORPORATION,

Plaintiff-Counterclaim
Defendant,

versus

CITY OF LAKELAND,

Defendant-Counterclaim
Plaintiff-Appellee,

versus

ECODYNE COOLING DIVISION OF
ECODYNE CORP., etc.,
FAIRFIELD ENGINEERING,
ST. PAUL FIRE AND MARINE
INSURANCE COMPANY, et al.,

Counterclaim Defendants,

FEDERAL INSURANCE COMPANY,

Counterclaim Defendant-
Appellant,

CHARLES T. MAIN, INC.,

Counterclaim Defendant,
Third-Party Plaintiff,

versus

THE MUNTERS CORPORATION, et al.,

Third-Party Defendants.

Appeal from the United States District
Court for the Middle District of Florida

Before TJOFLAT, Chief Judge, ANDERSON
and CLARK, Circuit Judges.

BY THE COURT:

This series of appeals was taken from the district court's judgment and amended judgment for attorney's fees and costs for the second phase of this complex litigation which arose from the construction of a power plant in the City of Lakeland, Florida. For the reasons that follow, we conclude that two of these appeals must be dismissed.

Federal Insurance Company filed appeal No. 90-3368 on April 20, 1990,

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from the district court's original judgment for attorney's fees and costs in the action. At that time, however, the parties' timely served motions to alter or amend the judgment were still pending in the district court. Since it is settled that a notice of appeal filed prior to the disposition of such motions is premature and ineffective, this appeal must be dismissed for lack of jurisdiction. Fed.R.App.P. 4(a)(4); Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed. 2d 225 (1982); Campbell v. Wainwright, 726 F.2d 702, 703 (11th Cir. 1984).

* * *

Lakeland filed appeal No. 90-3727 on August 3, 1990, following the district court's disposition of the post-judgment motions but prior to the

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entry of the district court's amended judgment on the docket on August 7. Federal and Fairfield Engineering filed a notice of appeal on September 7, thirty-one (31) days after entry of the amended judgment.

The Supreme Court has held that "a notice of appeal is ineffective unless filed after entry of judgment on a Rule 59 motion" Acosta v. Louisiana Department of Health & Human Resources, 478 U.S. 251, 254, 106 S.Ct. 2876, 2878, 92 L.Ed.2d 192 (1986) (per curiam). Therefore, Lakeland's notice of appeal was premature and ineffective. Moreover, the appeal filed by Federal and Fairfield was one day late, and that appeal must also be dismissed for lack of jurisdiction.

* * *

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The district court entered an order on January 10, 1991, granting Lakeland's motion for Fed.R.Civ.P. 54(b) Certification of its amended judgment for attorney's fees and costs. Appeals were filed by Lakeland and by Federal and Fairfield from that order, and they have been docketed under our case No. 91-3185. However, once the underlying judgment has been certified for immediate review, it is not clear that the district court needs to certify an order respecting attorney's fees and costs. Generally, only substantive claims have been considered considered certifiable under Rule 54(b). See 6 Moore's Federal Practice ¶ 54.33[2] (2d ed. 1990). Moreover, while the district court noted that it had previously directed the Clerk to enter a separate judgment, the

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court did not make the express determination that there was no just reason for delay in entering the judgment. See In re Yarn Processing Patent Validity Litigation, 680 F.2d 1338, 1339-40 (11th Cir. 1982) (per curiam). However, this Court has held that the district court may vacate and reenter its judgment pursuant to Fed.R.Civ.P. 60(b) to permit a timely appeal. See Harnish v. Manatee County, Florida, 783 F.2d 1535, 1538 (11th Cir. 1986). Accordingly, the district court's certification order is construed as such an order, and appeal No. 91-3185 MAY PROCEED.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-3368

ECODYNE COOLING DIVISION OF ECODYNE
CORPORATION,

Plaintiff-Counterclaim
Defendant,

versus

CITY OF LAKE LAND,

Defendant-Counterclaim
Plaintiff-Appellee,

versus

ECODYNE COOLING DIVISION OF
ECODYNE CORP., etc.,
FAIRFIELD ENGINEERING,
ST. PAUL FIRE AND MARINE
INSURANCE COMPANY, et al.,

Counterclaim Defendants,

FEDERAL INSURANCE COMPANY,

Counterclaim Defendant-
Appellant,

CHARLES T. MAIN, INC.,

Counterclaim Defendant,
Third-Party Plaintiff,

versus

THE MUNTERS CORPORATION, et al.,

Third-Party Defendants.

Appeal from the United States
District Court for the
Middle District of Florida

Before JOHNSON, ANDERSON and BIRCH,
Circuit Judges.

B Y T H E C O U R T:

Petition for Rehearing of
Appellants, Fairfield Engineering
Company and Federal Insurance Company
(construed as a Motion for Reconsider-
ation of this Court's order of June 19,
1991), is denied.

